Davis v. United States: The Exclusion Revolution Continues

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INTRODUCTION

During the past term, the Supreme Court decided three cases involving constitutional constraints upon law enforcement. *Kentucky v. King*[1] raised a substantive Fourth Amendment law issue—whether officers may conduct warrantless searches based on exigent circumstances of their own creation. The pro-law enforcement outcome was hardly unpredictable, but the extremity of the Court's position and its near unanimity were somewhat surprising. Eight Justices decided that the cardinal search warrant requirement is suspended when officers search a home or other private place based on exigency—such as potential evidence destruction—as long as "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment."[2] With the aim of avoiding the constitutional safeguard against their excess zeal or biased judgments, officers may apparently engage in any other kind of instigative conduct and may then rely upon the responses they generate.[3]

In *J.D.B. v. North Carolina*,[4] a slender majority reached an even more surprising—and pro-defense—conclusion. Five Justices ruled that age does matter in *Miranda* custody determinations.[5] Officers and judges must consider the psychological impact of youth in determining whether a reasonable person below eighteen would feel subjected to a "'restraint on freedom of movement of the degree associated with formal arrest.'"[6] Consequently, in a particular case, a child might be entitled to bar from trial a confession given without *Miranda* warnings even though prosecutors could introduce an unwarned confession from an adult subjected to an identical interrogation atmosphere.

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1 Kentucky v. King, 131 S. Ct. 1849 (2011).

2 *Id.* at 1858.

3 One can only wonder whether officers may act upon exigencies generated by conduct that violates *other* constitutional provisions—physical torture, for example.

4 J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

5 *Id.* at 2399, 2406.

6 *Id.* at 2402 (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995) (internal quotation marks, alteration, and footnote omitted)).

My task here is to assess the significance of *Davis v. United States*,[7] the third of the trilogy of 2010 Term criminal procedure opinions. Unlike the rulings in *King* and *J.D.B.*, the outcome of *Davis* was eminently predictable, virtually devoid of surprises.[8] The issue was whether evidence obtained during an unconstitutional vehicle search was subject to exclusion when, at the time of the search, a governing court of appeals decision deemed that search consistent with the Fourth Amendment.[9] Six Justices concluded that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."[10] The holding that the "exclusionary rule does not apply"[11] in those circumstances crafted another, quite circumscribed, "good faith" exception to the general prohibition of unconstitutionally obtained evidence. Evidence that officers acquire as a result of an unreasonable search or seizure is admissible if an appellate court with authority over the jurisdiction had previously declared a search or seizure of that sort reasonable. The evidentiary gains of unconstitutional conduct will be suppressed only in the rare, unlikely case that it was objectively unreasonable to believe that the erroneous appellate ruling was a valid Fourth Amendment interpretation.[12]

Recent encounters between the Roberts Court and the exclusionary rule had led me to expect that the Court would announce another novel and previously unimagined restriction on the suppression remedy. That was not the case. *Davis*' addition of another variety of good faith exception to the exclusionary rule was a virtually inevitable extension of the prior doctrine based on familiar themes. Despite the absence of new insights into the *Weeks-Mapp* rule, however, *Davis* is not insignificant. The opinion confirms the advent of a new era of exclusionary rule development, reflecting the Roberts Court's commitment to a revolutionary, and stifling, revision of the Fourth Amendment bar to illegally obtained evidence.

The reasons for my assessment are set forth in the discussion that follows. The discussion begins with a summary of *Davis* followed by a brief review of the exclusion doctrine's history. Next, I describe the sea change that began soon after the Roberts era began, recounting the rulings in *Hudson v. Michigan* and *Herring v. United States* that laid a foundation for *Davis*, and highlighting the themes,

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[7] *Davis*, 131 S. Ct. 2419 (2011).

[8] Perhaps the only surprise was new Justice Kagan's unqualified support for the majority opinion.

[9] *Davis*, 131 S. Ct. at 2423.

[10] *Id.* at 2423–24. A seventh Justice agreed that the exclusionary rule does not apply if binding appellate precedent provides specific authorization for the search that violates the Fourth Amendment. *See id.* at 2435. (Sotomayor, J., concurring in the judgment).

[11] *Id.* at 2434.

[12] It seems nearly inconceivable that an appellate ruling will be so far from the constitutional mark that it is unreasonable to believe that it is correct. Moreover, objective unreasonableness dictates suppression only under the narrow holding of *Davis*. Under the opinion's broader dictum, evidence is admissible even if officers negligently believe that an appellate precedent is valid. *See infra*, notes 103–08, 121–22 and accompanying text.

attitudes, and trends evident in these three opinions. Finally, I offer reflections on the impact of the revolutionary changes that have occurred.

I. THE SIMPLE CASE OF WILLIE DAVIS

In 2007, Alabama police officers arrested both the driver of a vehicle, Stella Owens, for driving while intoxicated, and a passenger, Willie Davis, for providing a false name.[13] The two handcuffed arrestees were placed in the back seats of patrol cars.[14] While searching Owens's vehicle, officers found a revolver inside Davis's jacket pocket.[15] Davis was subsequently indicted for "possession of a firearm by a convicted felon."[16] He moved to suppress the revolver from his trial, acknowledging that the vehicle search was authorized by Eleventh Circuit Court of Appeals precedent.[17] Consistent with the majority view, that court had determined that *New York v. Belton*[18] "establish[ed] a bright-line rule authorizing substantially contemporaneous vehicle searches incident to the arrests of recent occupants."[19] The trial court denied suppression, and Davis was convicted.[20]

While the case was on appeal, the Supreme Court decided in *Arizona v. Gant*[21] that *Belton* restricted the scope of searches incident to arrest more narrowly than the Eleventh Circuit's bright-line rule.[22] Under *Gant*, the Fourth Amendment permits the search of a passenger compartment incident to a recent occupant's arrest only "(1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains 'evidence relevant to the crime of arrest.'"[23] The Court of Appeals then concluded that under *"Gant*'s new rule" the vehicle search had violated the Fourth Amendment, but held that, in light of the binding precedent extant at the time of the search, the deterrent purposes of the exclusionary rule did not dictate suppression.[24] The appellate court "therefore declined to apply the exclusionary rule and affirmed Davis's conviction."[25] The Supreme Court granted Davis's

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[13] *Davis*, 131 S. Ct. at 2425.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 2425–26.

[17] *Id.* at 2426.

[18] New York v. Belton, 453 U.S. 454 (1981).

[19] *Davis*, 131 S. Ct. at 2426.

[20] *Id.*

[21] Arizona v. Gant, 556 U.S. 332 (2009).

[22] *Davis*, 131 S. Ct. at 2425–26.

[23] *Id.* at 2425.

[24] *Id.* at 2426. The unconstitutionality of the vehicle search is debatable. The arrest of Owens for driving under the influence might well have justified the search under the second prong of *Gant*'s holding.

[25] *Id.*

petition for a writ of certiorari.[26]

Six Justices joined an opinion affirming the Eleventh Circuit's logic and "hold[ing] that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."[27] The nuances of Justice Alito's supporting reasoning and other pertinent aspects of the opinion are discussed and analyzed later. For now, suffice it to say that the majority found this new good faith variant entirely consistent with deterrent objectives and with the cost-benefit balance that governs exclusionary rule analysis.[28]

II. THE EVOLUTION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE

The Court first recognized the Fourth Amendment exclusionary rule in a case decided nearly a century ago in *Weeks v. United States*.[29] Because the Fourth Amendment applies only to the federal government, the *Weeks* rule governed only in federal courts. Exactly half a century ago, in *Mapp v. Ohio*,[30] the Court held that the Fourteenth Amendment Due Process Clause—which binds states—included not only the right to privacy protected by the Fourth Amendment, but also the bar to evidence obtained in violation of that right. Since *Mapp*, state courts have been bound by a suppression doctrine identical to the federal exclusionary rule. Both limit prosecutors' abilities to prove guilt in identical ways.

Weeks and *Mapp* envisioned evidentiary exclusion as an integral part of the guarantee against unreasonable searches and seizures.[31] Both saw the introduction of illegally obtained evidence as a deprivation of a defendant's constitutional right.[32] *Mapp* also characterized exclusion as a "constitutionally required . . . deterrent safeguard" essential to preventing future violations of the right to security against unreasonable searches and seizures.[33] In addition, the *Mapp* majority relied on "the imperative of judicial integrity."[34] The exclusionary rule shielded judges from the taint of permitting law enforcers to reap courtroom profit from

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[26] *Id.*

[27] *Davis*, 131 S. Ct. at 2423–24. Justice Sotomayor agreed that "where 'binding appellate precedent specifically *authorize[d]* a particular police practice, . . . the exclusionary rule does not apply." *Id.* at 2435 (Sotomayor, J., concurring in the judgment) (emphasis in original). As a result, she agreed that suppression was unjustified in *Davis*.

[28] The majority rejected the argument that retroactivity principles required a holding that the vehicle search was unconstitutional *and* that the evidence found was barred. *Id.* at 2430–32.

[29] Weeks v. United States, 232 U.S. 383 (1914). The centennial of *Weeks* is but three years away.

[30] Mapp v. Ohio, 367 U.S. 643 (1961).

[31] *See* JAMES J. TOMKOVICZ, CONSTITUTIONAL EXCLUSION: THE RULES, RIGHTS, AND REMEDIES THAT STRIKE THE BALANCE BETWEEN FREEDOM AND ORDER 6, 16, 23–24 (2006). *Weeks* was a unanimous decision. *Mapp*, however, had bare majority support.

[32] *See Mapp*, 367 U.S. at 655–56; *Weeks*, 232 U.S. at 398.

[33] *Mapp*, 367 U.S. at 648.

[34] *Id.* at 659.

unconstitutional conduct.

The recognition that states had to exclude illegally-secured evidence was the major exclusionary rule achievement of the Warren Court. During the remainder of the 1960s, while issuing a number of landmark criminal procedure rulings, the Warren Court paid little attention to the contours of the exclusion doctrine.[35] Although it may have furnished a foundation for later erosion of the suppression sanction by emphasizing the future-oriented deterrent purpose in some opinions,[36] the Warren Court never abandoned the view that exclusion is a constitutional right belonging to the individual defendant on trial,[37] and never foreswore the judicial integrity rationale.[38]

The exclusionary rule sustained considerable erosion during the thirty-seven years of the Burger and Rehnquist Courts. A fundamentally different understanding of the justification for suppression facilitated the anti-suppression agenda. In a major ruling just five years after the Warren era ended, the Court announced that exclusion is "a judicially created remedy" and not "a personal constitutional right" of the accused.[39] The "prime purpose is to deter future unlawful police conduct," thereby enforcing the only Fourth Amendment right—out-of-court security against unreasonable searches and seizures.[40] This revision of the rationales for exclusion yielded a cost-benefit analysis that involves weighing deterrent gains against social costs. In several cases, the Burger and Rehnquist Courts employed this balancing analysis to resolve exclusion claims. In all but a few, the result was diminution of the suppression sanction.

For the most part, exclusionary rule erosion during the last three decades of

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[35] The Warren Court contributed little to the development of suppression law. One opinion applied the "attenuation" exception that predated *Mapp* by twenty-two years. *See* Wong Sun v. United States, 371 U.S. 471 (1963). Two others addressed whether defendants had "standing" to assert exclusion—another pre-*Mapp* limitation. *See* Alderman v. United States, 394 U.S. 165 (1969); Mancusi v. DeForte, 392 U.S. 364 (1968). The Court discussed three previously unaddressed issues: extending suppression to a nominally civil forfeiture proceeding with similarities to a criminal prosecution, *see* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); refusing to apply *Mapp* retroactively to cases final on appeal at the time *Mapp* was decided, *see* Linkletter v. Walker, 381 U.S. 618 (1965); and ruling that an accused's testimony at a suppression hearing to establish standing was inadmissible to prove his guilt at trial, *see* Simmons v. United States, 390 U.S. 377 (1968).

[36] *See Alderman*, 394 U.S. at 174–75; *Linkletter*, 381 U.S. at 633, 635–37.

[37] A year before Earl Warren's departure, the Court stressed that exclusion is a defendant's personal constitutional right and relied on that premise to bar suppression hearing testimony from trial. *See Simmons*, 390 U.S. at 389, 394.

[38] *See* Terry v. Ohio, 392 U.S. 1, 12–13 (1968) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)) (asserting, one year before Earl Warren left the Court, that "[t]he [exclusionary] rule also serves another vital function—'the imperative of judicial integrity'"); *see also Linkletter*, 381 U.S. at 635 (acknowledging that one reason *Mapp* concluded that states had to adhere to the exclusionary rule was that the admission "of illegal evidence . . . violate[d] 'the imperative of judicial integrity'").

[39] United States v. Calandra, 414 U.S. 338, 348 (1974).

[40] *Id.* at 347.

the twentieth century occurred within the confines of extant limitations on suppression. Several opinions tightened the "standing" requirement.[41] Two restrictively applied the core "but-for" causation demand.[42] One construed the longstanding "independent source" doctrine generously,[43] and another interpreted the acknowledged attenuation exception expansively.[44] One decision increased the prosecution's ability to impeach defendants with illegally obtained evidence.[45] There were only a few "novel" restrictions: a consistent refusal to extend suppression beyond criminal trials,[46] a bar to exclusionary rule claims in habeas corpus challenges,[47] and, perhaps most significantly, an inevitable discovery exception,[48] and three varieties of good faith exceptions.[49] Only occasional pro-exclusion rulings punctuated the campaign against suppression.[50] Generally, the exclusionary rule shrank as a result of a number of limited constraints announced in narrow holdings. By the end of the Rehnquist era, the cumulative damage was substantial. Still, the rule's core was intact, and there were no signs of imminent overthrow.[51] As the new millennium dawned, there was reason to believe that the Court might have achieved equilibrium. When the baton passed to John Roberts, however, everything changed. Before long, and without warning, revolution was in the air.

III. THE ROBERTS REVOLUTION: RHETORICAL AND DOCTRINAL ASSAULTS ON THE EXCLUSIONARY RULE

In the six terms since the arrival of Chief Justice Roberts and Justice Alito, the Court has rendered three significant exclusionary opinions in three unassuming cases. In each, the Court granted a defendant's petition for review after a lower

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[41] *See* Minnesota v. Carter, 525 U.S. 83 (1998); United States v. Padilla, 508 U.S. 77 (1993); Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); United States v. Payner, 447 U.S. 727 (1980); Rakas v. Illinois, 439 U.S. 128 (1978).

[42] *See* New York v. Harris, 495 U.S. 14 (1990); United States v. Crews, 445 U.S. 463 (1980).

[43] *See* Murray v. United States, 487 U.S. 533 (1988).

[44] *See* United States v. Ceccolini, 435 U.S. 268 (1978).

[45] *See* United States v. Havens, 446 U.S. 620 (1980).

[46] *See* Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998) (exclusionary rule inapplicable to parole revocation hearing); Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (suppression not applicable to civil deportation proceeding); *Calandra*, 414 U.S. 338 (1974) (exclusion not required from grand jury proceeding).

[47] *See* Stone v. Powell, 428 U.S. 465 (1976).

[48] *See* Nix v. Williams, 467 U.S. 431 (1984). Although *Nix* involved Sixth Amendment suppression, the doctrine clearly applies to the Fourth Amendment rule.

[49] *See* Arizona v. Evans, 514 U.S. 1 (1995); Illinois v. Krull, 480 U.S. 340 (1987); Massachusetts v. Sheppard, 468 U.S. 981 (1984); United States v. Leon, 468 U.S. 897 (1984).

[50] *See* Minnesota v. Olson, 495 U.S. 91 (1990); James v. Illinois, 493 U.S. 307 (1990); Brown v. Illinois, 422 U.S. 590 (1975).

[51] At this point, there were no Justices advocating the overthrow of *Weeks-Mapp*.

court had refused to suppress, then found the lower court ruling correct and affirmed admission of the contested evidence. None of the cases involved a need to remedy an exclusionary rule error. Moreover, while the technical holding in each is quite narrow, all three opinions relied on premises posing major threats to the exclusionary rule's health, providing potent evidence of a determination to revolutionize the law by dramatically curtailing, perhaps even abrogating, the *Weeks-Mapp* doctrine. In this part, I review the damage already done by *Hudson v. Michigan*[52] and *Herring v. United States*[53] before detailing how *Davis v. United States* furthered the program.

A. Hudson v. Michigan

Hudson involved a conceded violation of the knock-and-announce principle.[54] Officers entered a home pursuant to a search warrant for drugs and firearms prematurely—*i.e.*, without waiting the reasonable time required to allow occupants to respond.[55] The sole question was whether the drugs and firearm found upon entry had to be excluded from trial.[56] Because Michigan Supreme Court precedent held that evidence discovered after knock-and-announce violations was admissible under the inevitable discovery exception, the state courts denied suppression.[57] Hudson was convicted of drug possession.[58]

The Supreme Court heard oral arguments in early January 2006. Justice Sandra Day O'Connor, who had submitted a letter of retirement to the President in July of 2005, participated. The tenor and content of the arguments indicated an inclination to rule on the narrow inevitable discovery principle supporting Michigan's resolution.[59] Three weeks later, however, Justice Samuel Alito supplanted Justice O'Connor, and in mid-April, the Court scheduled reargument.[60] During reargument in May, there were signs that the Court might use *Hudson* as a vehicle for a more general examination of the vitality of the exclusion doctrine.[61]

In an opinion authored by Justice Scalia and joined by four other Justices, the Court starkly held that suppression is never available for knock-and-announce

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[52] Hudson v. Michigan, 547 U.S. 586 (2006).

[53] Herring v. United States, 555 U.S. 135 (2009).

[54] *Hudson*, 547 U.S. at 590.

[55] *Id.* at 588.

[56] *Id.* at 590.

[57] *Id.* at 588–89.

[58] *Id.* at 589.

[59] *See* David A. Moran, *Waiting for the Other Shoe:* Hudson *and the Precarious State of* Mapp, 93 IOWA L. REV. 1725, 1730 (2008). According to Professor Moran, who argued on Hudson's behalf, "[i]t seemed clear . . . that a majority . . . , including . . . Justice . . . O'Connor, was prepared" to hold that evidence acquired "as a result of knock-and-announce violations" had to be excluded. *Id.*

[60] *Id.* at 1731.

[61] *See id.* at 1732.

requirement violations.[62] This conclusion rested not on Michigan's narrow, inevitable discovery foundation, but, instead, on three independent and distinct doctrinal pylons, each of which threatened broader damage to the suppression sanction.[63]

Justice Scalia recited the familiar suppression principle that demands a but-for causal connection between an illegality and the acquisition of evidence, then applied that principle in *Hudson* after severing the unreasonable entry from the ensuing warranted search.[64] By viewing the entry and search as separate constitutional events, the majority was able to conclude that there was no causal connection between the knock-and-announce violation and the acquisition of the evidence inside Hudson's home. The lack of a but-for link precluded suppression.[65]

The Court next reasoned that even if there had been a causal connection, the "attenuation" exception to the exclusionary rule prevented exclusion for knock-and-announce violations.[66] This attenuation doctrine, however, bore no resemblance to the traditional attenuation exception, which only permits the admission of derivative evidence with remote connections to unconstitutionalities.[67] The new branch of attenuation authorized the introduction of *all primary and derivative evidence* acquired as a result of knock-and-announce violations because suppression would not serve the interests protected by the knock-and-announce rule.[68] Moreover, it appeared to rest on the bizarre, unprecedented premise that suppression aims to somehow reconceal evidence uncovered in violation of a constitutional safeguard whose purpose is to shield private information from government eyes and makes sense only if one ignores the deterrent logic that has long ruled the suppression roost.[69] It has the potential for considerable expansion, precluding suppression for any Fourth Amendment demand that serves an interest other than shielding information from government scrutiny.[70]

Finally, the Court reasoned that even if there was "unattenuated causation" between a knock-and-announce violation and the acquisition of evidence, suppression is inappropriate because costs *always* exceed benefits.[71] The Court had never before engaged in individualized cost-benefit balancing based on a

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[62] *Hudson*, 547 U.S. at 594, 599.

[63] For a thorough discussion of *Hudson*'s premises and implications, see James J. Tomkovicz, Hudson v. Michigan *and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819 (2008).

[64] *See id.* at 1851.

[65] *Hudson*, 547 U.S. at 592.

[66] *Id.* at 592–93.

[67] *See* Tomkovicz, *supra* note 63, at 1863.

[68] *Hudson*, 547 U.S. at 594.

[69] *See id.* at 593.

[70] *See* Tomkovicz, *supra* note 63, at 1864–65.

[71] *Hudson*, 547 U.S. at 594, 599.

particular type of Fourth Amendment wrong. Because a number of the dubious reasons relied upon in assessing the knock-and-announce cost-benefit balance are quite capable of extension to other improprieties, this third doctrinal maneuver could also erode suppression in other Fourth Amendment contexts.[72]

Hudson fired the first shots in the revolution by positing three independent—and questionable—doctrinal bases for eliminating exclusion for knock-and-announce violations when a simple, relatively conventional basis for rejecting suppression—the inevitable discovery doctrine—could have sufficed. The majority was surely aware of the damaging potential these doctrinal options harbored. It seems fair to conclude that Justice Scalia designed the three alternatives with the intent that they be employed to further erode the suppression remedy.

Verbal assaults on the exclusionary rule were en vogue long before 2006. Burger and Rehnquist Court exclusionary rule opinions evinced an exceedingly stingy attitude toward suppression. *Hudson*, however, escalated the rhetoric to new heights. Justice Scalia deemed evidentiary suppression a "massive" and "incongruent remedy"[73] that had "always been" the Court's "last resort."[74] Moreover, it not only set "the guilty free," it also set "the dangerous at large."[75] Perhaps the most significant suggestions were those alleging that earlier opinions, like *Mapp*, had not been circumspect in depicting exclusion and others indicating that the *Mapp* rule was the product of another era, that times and conditions had changed, and that the bar to probative evidence was not necessary or justifiable as it once might have been.[76] *Hudson* oozed antipathy toward exclusion, suggesting that interment was a genuine possibility.[77]

B. Herring v. United States

Two terms later, *Herring v. United States*[78] arrived. Officers in one jurisdiction had negligently failed to purge a recalled arrest warrant from their database.[79] A report by that jurisdiction that there was an active warrant led

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[72] For thorough discussion of the novel facets of this portion of the majority's reasoning and of its damaging potential, see Tomkovicz, *supra* note 63, at 1878–80.

[73] *Hudson*, 547 U.S. at 595.

[74] *Id.* at 591.

[75] *Id.*; *see also id.* at 595 (noting that a cost is that suppression runs "the risk of releasing dangerous criminals into society").

[76] *See id.* at 597–99.

[77] *See* Tomkovicz, *supra* note 63, at 1846–47. Justice Kennedy's mixed messages provided reason to wonder whether there was sufficient support for the revolutionary approach implicit in *Hudson*'s doctrinal and rhetorical offensives. *See id.* at 1848–49.

[78] *Herring*, 555 U.S. 135 (2009). For a thorough and incisive critique of the opinion, see Wayne R. LaFave, *The Smell of* Herring*: The Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009).

[79] *Herring*, 555 U.S. at 138.

officers from another jurisdiction to arrest Herring.[80] A vehicle search incident to the arrest produced contraband and a weapon.[81] The trial court denied suppression and the Eleventh Circuit affirmed, finding that the "arresting officers . . . 'were entirely innocent of any wrongdoing or carelessness,'" and holding that "the evidence was . . . admissible under the good-faith rule."[82] The appellate court relied upon the fact that the database "error was merely negligent and [was] attenuated from the arrest."[83] The narrow issue was whether the good faith exception extended to negligent record-keeping errors by law enforcement in one jurisdiction and objectively reasonable reliance on the erroneous record by officers in another jurisdiction.

Two and a half years after *Hudson*, a five-Justice majority provided further evidence of the Roberts Court's revolutionary mood. The Court affirmed the Eleventh Circuit's logic and conclusion, deeming exclusion inappropriate when there was nothing more than "isolated negligence attenuated from the arrest"[84] and when other officers acted in "objectively reasonable reliance" on the erroneous report.[85] This constituted an unprecedented extension of the good -faith doctrine to cases involving not only *law enforcement error* but also *objectively unreasonable* (that is, negligent) law enforcement error. Nonetheless, because its holding was exceedingly limited—authorizing the admission of evidence only when a negligent error is "attenuated" from an arrest and when arresting officers lack fault[86]—*Herring* did not impose a dramatic, or particularly threatening, restriction upon suppression.

The *Herring* majority, however, was not content merely to resolve this narrow issue. Significantly, and quite broadly, Chief Justice Roberts announced that "the question [of suppression] turns on the *culpability* of the police and the potential of exclusion to deter *wrongful* police conduct,"[87] that "the extent to which the exclusionary rule is justified by . . . deterrence principles varies with the *culpability* of the law enforcement conduct,"[88] that "[t]o trigger the exclusionary rule, police conduct must be *sufficiently deliberate* that exclusion can meaningfully deter it, and *sufficiently culpable* that such deterrence is worth the price paid by the justice system,"[89] and, ultimately, that "the exclusionary rule serves to deter [only] *deliberate, reckless, or grossly negligent conduct*, or in some circumstances

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[80] *Id.* at 137.

[81] *Id.*

[82] *Id.* at 138–39.

[83] *Id.*

[84] *Id.* at 137.

[85] *Id.* at 146.

[86] *Id.* at 137, 139–40.

[87] *Id.* at 137 (emphasis added).

[88] *Id.* at 143 (emphasis added).

[89] *Id.* at 144 (emphasis added).

recurring or systemic negligence."[90] Because no officer in *Herring* had culpability rising to the requisite level—the only fault being a nonrecurring, negligent record-keeping error—"any marginal deterrence" that might result from suppression could "not 'pay its way'"[91] and "'the extreme sanction of exclusion'" was unjustified.[92]

Herring and *Hudson* have similarities. Both involved limited issues resolved properly by lower courts followed by Supreme Court affirmances that inflicted more damage upon the exclusionary rule than necessary. *Herring*, however, was nearly devoid of the pejorative rhetorical flourishes strewn throughout *Hudson*.[93] More important, *Herring* did not tread in any of *Hudson*'s revolutionary doctrinal footsteps. The majority opted for a different, and quite devastating, analytical tack, opening up a new front in the effort to depose—or at least render impotent—the *Weeks-Mapp* doctrine.

After defining a new variety of good faith exception, the Court identified a basic threshold requirement for operation of the exclusionary rule, a "culpability" demand that, like "standing" and "but-for" causation, guards the suppression gate.[94] This "fault" criterion bars any possibility of exclusion—and renders exceptions unnecessary—unless officers are, at a minimum, grossly or recurrently negligent.[95] In essence, *Herring* installed a novel filter for exclusionary rule claims, narrowing further the neck through which they must pass. Moreover, it rendered quite superfluous every variety of good faith doctrine previously announced. To qualify for the good faith exception, officers must act in objectively reasonable reliance upon constitutional missteps of others, but, according to *Herring*'s culpability criterion, the exclusionary rule is not triggered even when officers are objectively unreasonable in relying on others' errors. Merely negligent or careless Fourth Amendment violations by officers cannot justify suppression.[96]

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[90] *Id.* (emphasis added).

[91] *Id.* at 147–48 (quoting *Leon*, 468 U.S. at 907–08 n.6 (1984)).

[92] *Id.* at 140 (quoting *Leon*, 468 U.S. at 916).

[93] The Court did repeat *Hudson*'s assertion that "exclusion 'has always been our last resort, not our first impulse,'" *id.* at 140 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)), but otherwise the *Herring* Court resisted the urge to heap more rhetorical tar upon the suppression doctrine.

[94] *Id.* at 143–44.

[95] The Court seemed a bit equivocal about whether recurrent negligence—i.e., a pattern of careless errors or carelessness that is systemic—would suffice. *See id.* at 144 (asserting that "in some circumstances" the "exclusionary rule serves to deter . . . recurring or systemic negligence"); *id.* at 146 (stating that "systemic errors . . . might" support a recklessness finding).

[96] Unlike the revolutionary doctrinal premises in *Hudson*, *Herring*'s novel constriction of suppression provoked not a whisper of resistance from Justice Kennedy, no hint that he found this revision of the exclusionary rule troubling. *Herring*'s culpability threshold attracted the unqualified support of five Justices.

C. Davis v. United States

Two and a half years later, the Court decided *Davis v. United States*.[97] As noted, *Davis* held that if officers acquire evidence by means of an unreasonable search or seizure, but have reasonably relied upon binding appellate precedent, suppression is inappropriate.[98] This good faith exception for Fourth Amendment errors by judges and faultless law enforcement conduct—*i.e.*, officers lacking even negligence—was consistent with precedent.[99] Relying on key premises supporting *United States v. Leon*—the pillar on which all good faith doctrines stand—the majority reasoned that "when binding appellate precedent specifically *authorizes* a particular police practice," an officer who engages in the sanctioned practice "does no more than 'ac[t] as a reasonable officer would and should act' under the circumstances."[100] In such a case, exclusion would only serve to "deter . . . conscientious police work" and would "discourage the officer from 'do[ing] his duty.'"[101] The refusal to suppress evidence obtained "during a search conducted in reasonable reliance on binding precedent," despite a later determination that the search was unconstitutional, followed from the Court's prior recognition that "the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.'"[102] In sum, the narrow holding of *Davis*, which does minimal damage to the suppression remedy, was hardly unpredictable, and far from revolutionary.

As in *Hudson* and *Herring*, however, *Davis* eschewed the straight and narrow path. Venturing well beyond what was necessary to resolve the case, Justice Alito proffered another basis for denying suppression in cases like *Davis*. This alternative, much broader rationale confirmed the Roberts Court's determination to radically reform the exclusionary rule by severely limiting its presumptive reach.[103]

The *Davis* majority forcefully reaffirmed *Herring*'s culpability threshold, asserting that "the deterrent value of exclusion is strong and tends to outweigh the resulting costs" *only* when officers "exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights."[104] According to Justice Alito,

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[97] Davis v. United States, 131 S. Ct. 2419 (2011).

[98] *Id.* at 2423–24, 2434.

[99] The first three good faith doctrines—announced in *Leon*, 468 U.S. 897 (1984), *Krull*, 480 U.S. 340 (1987), and *Evans*, 514 U.S. 1 (1995)—suspended suppression when law enforcement officers act in objectively reasonable reliance on constitutional errors of others. *Davis* was a much more logical outgrowth of those rulings than *Herring*, which authorized the admission of evidence when *officers* make Fourth Amendment mistakes and at least some officer conduct is *objectively unreasonable*.

[100] *Davis*, 131 S. Ct. at 2429 (quoting *Leon*, 468 U.S. at 920).

[101] *Id.*

[102] *Id.* (quoting *Leon*, 468 U.S. at 919).

[103] Moreover, Justice Kagan enlisted in the revolutionary army, joining the majority opinion without qualification.

[104] *Id.* at 2427.

"when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful or when their conduct involves only simple, 'isolated' negligence, the '"deterrence rationale loses much of its force,"' and exclusion cannot 'pay its way.'"[105] The "acknowledged absence of police culpability"—the fact that the searching officers "did not violate Davis's Fourth Amendment rights deliberately, recklessly, or with gross negligence" and lack of any "'recurring or systemic negligence'"—"doom[ed] Davis's [suppression] claim."[106] Even if it had been objectively unreasonable for officers to believe that the precedent authorizing the search was constitutional, the evidence would have been admissible because the exclusionary rule is neither a "strict-liability regime" nor an "'[i]solated,' 'nonrecurring' police negligence" regime.[107] In sum, *Davis* delivered an unmistakable doctrinal message: the culpability threshold announced in *Herring* was no passing fancy or trial balloon. It is a serious and demanding prerequisite precluding suppression in the absence of a sufficiently blameworthy Fourth Amendment violation by law enforcement.[108]

Like *Herring*, and unlike *Hudson*, *Davis* contained little inflammatory language. Justice Alito did accuse the exclusionary rule of, "in many cases, . . . suppress[ing] the truth and set[ting] the criminal loose in the community without punishment."[109] Moreover, he described it as a "bitter pill" that "society must swallow . . . when necessary, but only as a 'last resort.'"[110] Otherwise, the majority's rhetoric was quite temperate. Justice Alito's characterization of the nature of the exclusionary rule, however, seems significant—and potentially corrosive. After noting that the Fourth Amendment text makes no mention of suppression, he described the "exclusionary rule . . . [as] a 'prudential' doctrine . . . created by th[e] Court to 'compel respect for the constitutional guaranty.'"[111] Some early decisions had "suggested that the rule was a self-executing mandate implicit in the Fourth Amendment," but the Court's later opinions had corrected that misconception, "acknowledg[ing] the exclusionary rule for what it undoubtedly is—a 'judicially created remedy' of th[e] Court's own making."[112] Moreover, this "'judicially created' sanction [is] specifically designed as a

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[105] *Id.* at 2428 (quoting *Leon*, 468 U.S. at 919, 908, n.6 (quoting United States v. Peltier, 422 U.S. 531, 539 (1975))).

[106] *Davis*, 131 S. Ct. at 2428.

[107] *Id.* at 2428–29 (quoting *Herring*, 555 U.S. at 137, 144 (2009)).

[108] The endorsement of *Herring*'s suffocating culpability requirement did not escape the notice of the Justices who refused to join the majority opinion. *See Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring in the judgment) (asserting that culpability "is not dispositive"); *id.* at 2439 (Breyer, J., dissenting) (objecting to the Court's placement of "determinative weight upon . . . culpability").

[109] *Id.* at 2427 (majority opinion).

[110] *Id.* (quoting *Hudson*, 547 U.S. at 591).

[111] *Davis*, 131 S. Ct. at 2426.

[112] *Id.* at 2427.

'windfall' remedy to deter future Fourth Amendment violations."[113]

Finally, the *Davis* majority endorsed an exceedingly restrictive understanding of the exclusionary rule's objective. According to Justice Alito, the contention that suppression was necessary in situations involving reliance on binding precedent to prevent "stunt[ing] the development of Fourth Amendment law" could not be "reconcile[d] with [the] modern understanding of the role of the exclusionary rule" because "the *sole* purpose . . . is to deter misconduct by law enforcement."[114] The Court rejected the "suggest[ion] that the exclusionary rule should be modified to serve a purpose other than deterrence of *culpable* law-enforcement conduct."[115] The Court, thus, made it clear that no other objective will inform the scope of the suppression sanction. Moreover, the Court incorporated the culpability limitation into the deterrent aim, indicating that the object is not to discourage *all* Fourth Amendment violations, but only to prevent culpable constitutional transgressions. This reconception of suppression's objective was an interesting, and clever, twist on an old theme.

IV. THE PRESENT AND FUTURE OF THE FOURTH AMENDMENT EXCLUSIONARY RULE: A CRITICAL ASSESSMENT OF THE ROBERTS REVOLUTION

Assessment of the significance of *Davis* requires an appreciation of both *Hudson* and *Herring*. Unlike its predecessors, *Davis* offers little that is novel or unpredictable. Its primary importance is confirmation and clarification of the revolutionary path the Court intends to follow. This final section discusses that path, analyzing critical facets and underpinnings, and ventures speculations about exclusion's future.

A. *The Erosive Contributions of* Davis

Hudson signaled that the Roberts Court had the suppression sanction in its crosshairs. The disdainful tone, hostile rhetoric, and anti-exclusionary rule reasoning suggested a genuine possibility that the goal was abolition. *Herring* confirmed the commitment to revolutionize the law, but took a distinctly different approach. Instead of bludgeoning the *Weeks-Mapp* doctrine further, the Chief Justice opted for a less confrontational style. There were no suggestions that exclusion was a relic that had outlived its usefulness and only a sprinkling of pejoratives. The majority could have relied upon either *Hudson*'s attenuation or cost-benefit basis for denying suppression,[116] but eschewed both doctrinal routes.

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[113] *Id.* at 2433–34.

[114] *Id.* at 2432 (emphasis in original).

[115] *Davis*, 131 S. Ct. at 2432–33 (emphasis added).

[116] The Court could have applied attenuation by reasoning that suppression does not serve the interests safeguarded by Fourth Amendment protection against unreasonable seizures of persons—liberty and dignity. Alternatively, the Justices could have reasoned that the costs of suppression for this type of transgression outweigh any deterrent gains—relying on several of the premises that

Instead, the Chief Justice acknowledged "core concerns" that justified an evidentiary bar in some situations and prescribed a culpability criterion that reflects those concerns and dramatically constricts the reach of the exclusionary rule.[117]

In tone, attitude, logic, and tactic, *Davis* is *Herring*'s offspring. The first three terms of the Roberts Court showed that there was more than one way to "skin" an exclusionary "cat." *Davis* confirmed that, at least for now, the Justices prefer the more respectful, seemingly more moderate, politically more palatable strategy adopted in *Herring*.[118] While preserving exclusion, the *Herring-Davis* culpability threshold revolutionizes that remedy by restricting it to a very small number of cases involving sufficiently blameworthy police misconduct. It does not eliminate, or even presage elimination of, the exclusionary rule.

While it is distinctly less confrontational, the *Herring-Davis* route may prove an even greater doctrinal threat to the vitality of the exclusionary rule than *Hudson*'s approach. *Hudson* carved three doctrinal holes with the potential to erode suppression one case at a time. The *Herring-Davis* culpability requisite threatens to stifle exclusionary rule enforcement of the Fourth Amendment immediately by choking off the source of cases that presumptively trigger suppression.[119] After *Herring*'s announcement of a culpability threshold in dictum supported by a five-Justice majority, it was possible the Court might reconsider, or even ignore, that limitation in future cases. *Davis* powerfully affirms that an augmented, six-Justice majority is committed to imposing this novel, and severe, restriction upon the purview of suppression. Although technically *Davis*'s reaffirmation of the culpability demand may also be dictum, it is dead serious dictum. There is no reason to doubt that the majority's unequivocal endorsement of and reliance on that premise in *Davis* is controlling. The case could have been resolved on the narrow ground that objectively reasonable reliance on judicial mistakes justifies an exception to the exclusionary rule. Instead, the Court placed equal (and inseparable) reliance on the ground that officers lacked the minimal culpability required for suppression.

According to the Court, the exclusionary rule is designed to grant defendants an evidentiary "windfall" for the limited purpose of deterring "culpable" law enforcement violations of the guarantee against unreasonable searches and seizures. It operates *only* when officers' unconstitutional actions are blameworthy

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informed the balance in *Hudson*.

[117] *Hudson*'s abrasive approach attracted shaky support from a bare majority. *Herring*'s gentler strategy garnered unqualified support from five Justices, and, in *Davis*, attracted a sixth Justice. The Chief Justice apparently subscribes to the maxim that one catches more flies with honey than vinegar.

[118] This is not to suggest that *Hudson* is a dead letter or that the Court will not find it useful in future cases. Moreover, the revolutionary spirit that animated *Hudson*'s verbal assaults is alive and well.

[119] *See Davis*, 131 S. Ct. 2419, 2438–40 (2011) (Breyer, J., dissenting); *Herring*, 555 U.S. at 156–57 (Ginsburg, J., dissenting).

enough. Simple, isolated negligence—objective unreasonableness—is insufficient fault. Henceforth, the only Fourth Amendment transgressions that entitle defendants with standing to claim suppression will be those in which defendants prove deliberate, reckless, grossly negligent, or recurrently negligent conduct.[120]

The practical, concrete ramifications of this revolutionary development are unmistakable. Suppose that officers erroneously believe, for example, that an arrest or search warrant is valid, that a warrant authorizes the search of a particular place, that there is a fair probability that a person committed an offense or that a car contains contraband, that there is a reasonable suspicion of crime and danger, or that a fleeing felon poses a danger of serious physical harm. If their errors were merely careless—objectively unreasonable—the evidence they acquire is admissible. Suppression follows only if it was grossly objectively unreasonable for officers to believe that their search or seizure complied with the Fourth Amendment. Constitutional violations will not trigger exclusion unless they are flagrantly abusive or egregious—grossly divergent from constitutional norms—or are careless and have been repeated often enough to demonstrate systemic negligence. Surely this will be a minuscule category of cases. The supply of Fourth Amendment violations justifying suppression will dwindle to a trickle. Judicial involvement in the enforcement of that fundamental Bill of Rights provision will inevitably wane.[121]

B. *Reflection Upon and Speculation About* Davis*'s Revolutionary Premises*

According to *Mapp v. Ohio*, the exclusionary rule was "judicially implied," but "constitutionally required" as both an "essential ingredient" of the Fourth Amendment and a necessary deterrent safeguard.[122] The Burger Court launched its campaign against exclusion by rejecting the constitutional right predicate, casting the rule as primarily a deterrent device, characterizing it as a "judicially *created* remedy," and purging assertions that it was "constitutionally required."[123] *Herring* observed that the Fourth Amendment text did not bar evidence and affirmed that the rule was "judicially created"—that is, "establish[ed]" by the Court's "decisions."[124] *Davis*'s reflections on the nature of exclusion subtly diminished its stature further. Justice Alito reiterated that the Fourth Amendment "says nothing" about evidentiary suppression, reaffirming that "the exclusionary rule . . . is a

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[120] It merits mention that the burden of proving culpability, like the burden of showing a constitutional violation, standing, and but-for causation, falls on the defendant because sufficiently blameworthy conduct is needed "to trigger" suppression. *See Herring*, 555 U.S. at 144. The burden of establishing an "exception" to the exclusionary rule falls upon the government.

[121] *See Davis*, 131 S. Ct. at 2440 (Breyer, J., dissenting).

[122] *Mapp*, 367 U.S. at 648, 651 (1961).

[123] *See, e.g.*, *Calandra*, 414 U.S. at 348 (1974) (emphasis added).

[124] *See Herring*, 555 U.S. at 139.

'prudential' doctrine . . . created by th[e] Court."[125] He disavowed the "'[e]xpansive dicta . . . suggest[ing] that the rule was a self-executing mandate implicit in the Fourth Amendment itself,'" and observed that the Court had already "acknowledge[d] the exclusionary rule for *what it undoubtedly is—a 'judicially-created remedy' of th[e] Court's own making*."[126] Suppression is nothing more than "a 'judicially created' sanction . . . specifically designed as a 'windfall' remedy."[127]

These depictions of the source and character of the exclusionary rule seem designed to promote the revolutionary cause by weakening its foundations even further. The Supreme Court has no "supervisory power" over, and therefore cannot impose mere rules of evidence on, the states.[128] Authority to compel states to exclude evidence must be derived from the Constitution. Nonetheless, the Court has deliberately refrained from describing the exclusionary rule as "constitutional" in origin. Moreover, *Davis* deemed it misguided to suggest that this merely "prudential" doctrine of the Court's "own making" was implicit in the Fourth Amendment, which furnished no textual foundation.

The object of these increasingly stingier characterizations of suppression could be to lay a foundation for outright abolition. Ultimately, the Court could admit that in announcing and adhering to the exclusionary rule it exceeded its constitutional authority, arrogating to itself an indefensible "creative" power. It seems unlikely, however, that the Court will confess such fundamental error. It seems somewhat more likely that the Justices might cite the weakened underpinnings of the exclusionary rule as grounds for finding it replaceable. We may learn that the exclusionary rule is cousin to *Miranda*, a product of the constitutional authority to preserve Fourth Amendment rights by providing *some* enforcement mechanism. Suppression may turn out to be *a* constitutionally necessary sanction imposed in the absence of effective alternatives, not *the* sanction required by the Fourth Amendment. If the Court perceives or devises an effective replacement, *Davis*'s conception of the exclusionary rule would not stand in the way. For now, the prevailing understanding of the exclusionary rule's nature will prevent any expansion and may well facilitate further contraction.[129]

Davis affirmed that the *sole* objective of exclusion is future-oriented deterrence,[130] and then further narrowed the "purpose" from deterrence of Fourth

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[125] *See Davis*, 131 S. Ct. at 2426.

[126] *Id.* at 2427 (emphasis added).

[127] *Id.* at 2433–34.

[128] *See* Dickerson v. United States, 530 U.S. 428, 438 (2000).

[129] With a culpability threshold in place, there will not be many opportunities to erode suppression further. One possibility that would seem to have majority support today is the overruling of *James v. Illinois*, 493 U.S. 307 (1990), and a holding that the government may impeach defense witnesses by introducing evidence obtained in culpable violation of the Fourth Amendment.

[130] The majority kept open the possibility that the need "to prevent Fourth Amendment law from becoming ossified" *might* justify permitting a defendant who succeeds in securing reversal of a binding Supreme Court precedent to reap the "windfall" of suppression in his case. *See Davis*, 131 S.

Amendment violations to "deterrence of *culpable* law-enforcement conduct."[131] It turns out that suppression is not designed to discourage *all* unreasonable searches or seizures or even all that are deterrable.[132] The goal is to discourage constitutional deprivations involving sufficient official fault.

The Court found some precedential support for this narrower-than-ever focus in the fact that the seminal exclusionary rule cases—*Weeks*, *Silverthorne*, and *Mapp*—all involved abusive, flagrant, "patently unconstitutional" Fourth Amendment wrongs.[133] Culpable violations of this sort were, thus, "the core concerns that led [the Court] to adopt the rule in the first place."[134] In addition, "the *Leon* line of cases," which is grounded in a "basic insight" concerning the relationship between culpability and "the deterrence benefits of exclusion," supports restricting the exclusionary rule to culpable violations.[135] Moreover, "in 27 years of practice under *Leon*'s good faith exception, [the Court had] 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct."[136] In other words, not only had the Court adopted the exclusionary rule to respond to culpable violations, but its decisions since 1984 reflected that same focus and concern.

I do not quibble with the Court's description of the precedents, but question the lessons drawn. *Weeks*, *Silverthorne*, and *Mapp* did involve egregious violations. However, it seems unfair to infer from the facts of those three cases that the "core," indeed, the sole, "concerns" were not merely constitutional violations, but blameworthy improprieties. At the time of those landmark opinions, the Justices believed in a constitutional *right* to exclude illegally obtained evidence, and none contains a hint that this personal right hinged on official intention, flagrancy, abusiveness, or "patent" unconstitutionality.[137] Reliance on the facts of those cases as the basis for a fundamental doctrinal restriction upon the constitutional entitlement they recognized seems strained and disingenuous.[138]

The effort to draw support from "the *Leon* line" fares no better. *Leon* was

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Ct. at 2433–34.

[131] *See id.* at 2433.

[132] *See Herring*, 555 U.S. at 144 n.4 (2009).

[133] *See id.* at 143–44.

[134] *Id.*

[135] *Davis*, 131 S. Ct. at 2427; *see Herring*, 555 U.S. at 141–42.

[136] *Davis*, 131 S. Ct. at 2429 (quoting *Herring*, 555 U.S. at 144); *see Herring*, 555 U.S. at 144 (asserting that, since *Leon*, the Court had "never applied the rule to exclude evidence . . . where the police conduct was no more intentional or culpable than" the "nonrecurring and attenuated negligence" in *Herring*).

[137] *See supra* text accompanying notes 31–32.

[138] The reliance on Judge Friendly's view regarding the need for culpability is hardly persuasive. *See Herring*, 555 U.S. at 143. The Court never accepted his effort to so confine evidentiary suppression.

decided after exclusion's demotion to the status of mere deterrent device. Its logic did *suggest* that when officers have *no* fault—when it is objectively reasonable to believe that they are acting constitutionally—deterrence cannot justify exclusion. Until *Herring*, however, the Court's good faith rulings all *required* that officers be "objectively reasonable."[139] The clear implication was that the exclusionary rule was not a strict liability sanction, but that mere, isolated negligence justified suppression that would remove incentives for official carelessness and promote constitutional compliance. The *Leon* line furnishes no support for a general culpability requirement greater than simple negligence.[140]

Finally, the absence of any post-*Leon* decision mandating suppression in a case involving culpability no greater than isolated negligence provides no precedential support for a higher threshold fault requirement. This *lack of precedent* reflects the inconsequential fact that the question of whether negligent violations trigger suppression did not reach the Court. Moreover, in light of the indication in the good faith opinions that objective reasonableness was necessary to avoid exclusion and that negligence was an appropriate target of deterrence, it is not surprising that this issue did not arise.

The exceedingly strained readings of precedent would not be as troubling if the Court had offered solid substantive justifications for its novel culpability gatekeeper. The thin, sketchy quality of the explanations of the premises underlying the general demand for culpability and the specific demand for more than negligence only heighten suspicion about the merits of the Roberts revolution. Perhaps the Justices recognized the weaknesses in their logic and thought it wiser not to construct a larger target for critics of their unprecedented, and severe, constriction of suppression's domain.

Herring tied the culpability requisite to the deterrent objective of suppression and the cost-benefit balance that dictates exclusionary rule analysis.[141] According to the Chief Justice, suppression "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct."[142] He asserted that "[t]he extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct"[143] and explained that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence

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[139] *See Evans*, 514 U.S. at 16; *Krull*, 480 U.S. at 356–57; *Sheppard*, 468 U.S. at 987–88; *Leon*, 468 U.S. at 922.

[140] Of course, neither *Leon* nor its progeny had *held* that a mere lack of negligence precluded suppression. The pre-*Herring* good faith decisions had also required sources of error outside law enforcement. The absence of culpability that justified admitting evidence had two components—no error at all by law enforcement and no negligence by officers who relied on another's error. Before *Herring*, it was possible that suppression might be appropriate in cases involving objectively reasonable beliefs by officers responsible for Fourth Amendment errors.

[141] *See Herring*, 555 U.S. at 143–46.

[142] *Id.* at 137.

[143] *Id.* at 143.

is worth the price paid by the justice system."[144] In defending the demand for more than isolated negligence, the Chief Justice acknowledged that sanctions, including exclusion, can deter negligent conduct but concluded that any deterrent benefits suppression yields in cases of negligence are "not worth the cost."[145] The substantial social costs of barring the evidentiary products of isolated negligence outweigh any gains in preventing future unconstitutionalities.[146] The "claim that police negligence automatically triggers suppression cannot be squared with principles underlying the exclusionary rule," because "any marginal deterrence" that would result cannot "'pay its way.'"[147] At a minimum, "systemic error or reckless disregard of constitutional requirements" is necessary to tip the balance in favor of suppression.[148]

Davis endorsed this reasoning.[149] According to Justice Alito, "the deterrent value of exclusion is strong and tends to outweigh the resulting costs" when officers engage in "'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights."[150] When conduct is objectively reasonable or involves "only simple, 'isolated' negligence," the deterrent benefits are less substantial and are insufficient to justify the social costs.[151] "[T]he harsh sanction of exclusion" is appropriate "only when" officers' unreasonable searches and seizures "are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the judicial system.'"[152]

One apparent premise is that officers who are more than negligent are more likely to care about and be attuned to the loss of evidence and to respond by modifying their unconstitutional conduct. Officers whose only fault is an objectively unreasonable belief that their acts are constitutional—those who are merely careless and should know better—are not very likely to respond to the threat of suppression either because they will not foresee or do not care about that consequence. For these reasons, the deterrent value of suppression for mere negligence is less weighty.

Another underlying premise is that barring the truth from a criminal trial is an unjustifiably disproportionate sanction for isolated negligence—*i.e.*, an undeserved penalty for conduct that is minimally blameworthy. Occasional carelessness is hardly abnormal, and officers whose only failing is negligence are hardly "culpable

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[144] *Id.* at 144.

[145] *Id.* at 144 n.4.

[146] The description of the cost-benefit balance was less extensive in *Herring* than in other significant exclusionary rule opinions.

[147] *Herring*, 555 U.S. at 147–48.

[148] *Id.* at 147.

[149] *See Davis*, 131 S. Ct. at 2427–28.

[150] *Id.* at 2427 (quoting *Herring*, 555 U.S. at 144).

[151] *Id.* at 2427–28 (quoting *Herring*, 555 U.S. at 137).

[152] *Id.* at 2428 (quoting *Herring*, 555 U.S. at 144).

enough" to be "'[p]enaliz[ed]'" by the "harsh sanction of exclusion."[153] In sum, the exclusionary rule's punitive consequences for officers, for the judicial system, and, indeed, for society are unjustifiable absent sufficient fault. Without sufficient moral blameworthiness, suppression is not "'worth the price paid.'"[154]

As usual, the Court's assessment of the costs and benefits of suppression for negligent Fourth Amendment violations was not based on measurable, empirical evidence. Instead, it rests on debatable assumptions about human nature and the effects of exclusion. Tort law posits that careless individuals are capable of foreseeing and inclined to respond to undesired legal consequences, that is, that sanctions will reduce the incidence of negligent conduct.[155] Moreover, the view that officers who are merely negligent are, by nature, likely to care more about successful prosecution and more likely to respond to exclusion by exercising ordinary care is hardly implausible. Negligent officers might, in fact, be less resistant to deterrent sanctions than those with greater fault. Finally, it seems fair to conclude that a high percentage of unreasonable searches and seizures will involve isolated negligence and that greater culpability will be rare.[156] If so, then suppression will yield substantial cumulative gains in Fourth Amendment enforcement.[157] Contrary to the conclusion of the revolutionaries, the benefits of suppression for nonrecurrent negligence may well be worth the price paid.

The contention that exclusion is an unjustified and disproportionate penalty for merely negligent conduct rests on a distortion of the exclusionary rule's very nature. Evidentiary suppression has never been punitive in character, analogous to sentences imposed for crimes.[158] Deterrence results from removing incentives for future illegalities—*i.e.*, depriving the government of illegally obtained advantages. The object is not to make officers suffer a penalty for blameworthy acts.[159] Because the exclusionary rule is not a punitive sanction, it seems misguided, at best, and misleading, at worst, to suggest that suppression for mere negligence is unacceptable because it penalizes officers more than they deserve. The proportionality premise that underlies the revolution is fundamentally flawed, discordant with the long-prevailing conception of how suppression deters unconstitutional acts.

The theoretical bases offered to support the culpability demand seem thin, questionable, and flawed—hardly sufficient to justify the revolutionary constriction of suppression's territory. But what of the unspoken premises?

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[153] *Id.* at 2428–29 (quoting *Krull*, 480 U.S. at 350).

[154] *Davis*, 131 S. Ct. at 2428 (quoting *Herring*, 555 U.S. at 144).

[155] *See Herring*, 555 U.S. at 153 (Ginsburg, J., dissenting).

[156] *See Davis*, 131 S. Ct. at 2439–40 (Breyer, J., dissenting).

[157] *See id.* at 2440 (Breyer, J., dissenting) (suggesting that the culpability requirement will result in a substantial loss of Fourth Amendment rights).

[158] *See id.* at 2438 (Breyer, J., dissenting).

[159] If it were punitive, the principle that suppression must not put officers in a worse evidentiary position would be questionable. *See* Murray v. United States, 487 U.S. 533, 542 (1988).

Neither *Herring* nor *Davis* questioned the legitimacy of the *Weeks-Mapp* doctrine. Yet neither disavowed the challenges posed by *Hudson* or the assumptions supporting those challenges. It seems entirely likely that some, if not all, of the Justices who endorsed the less confrontational, more temperate approach of *Herring-Davis* were motivated by the exclusionary rule animus that permeated *Hudson*. Both opinions repeated *Hudson*'s characterization of suppression as a "last resort," and *Davis* described it as a "bitter pill."[160] Like *Hudson*'s novel doctrinal twists, the culpability threshold reflects a sense that the exclusionary rule is more trouble than it's worth, has largely outlived its usefulness, and is no longer needed to ensure adequate enforcement of the Fourth Amendment. Although not explicit in *Herring* or *Davis*, assumptions about increased law enforcement professionalism and the availability and effectiveness of alternative remedies probably played roles. Moreover, the Justices may well doubt the efficacy of suppression—*i.e.*, whether future courtroom losses really do motivate investigators. It seems clear that they do not fear that imposing the greater-than-negligence culpability demand will open the floodgates of Fourth Amendment carelessness.

It is difficult to believe that the Justices are unaware of how severely the *Herring-Davis* doctrine curtails the exclusionary rule's reach. Under a culpability regime, suppression will be the exception, not the norm, for evidence gained from unreasonable searches and seizures. The Roberts revolution must rest on an assessment of practical realities and a conclusion that the rarity of exclusion will inflict little constitutional harm and produce substantial social benefit.

Assuming that the exclusion of evidence is a deterrent enforcement mechanism and not a constitutional right,[161] reliance on real-world consequences, impacts, and needs seems not only appropriate, but also commendable. The premises that support the culpability doctrine may reflect an accurate, eminently realistic evaluation of the need for the suppression remedy today. The fault demand may be grounded in defensible inferences and conclusions about the consequences of dramatically curtailing exclusion. It is troubling, however, that the Justices are unwilling to express and embrace the premises that undergird their revolution, that they refuse to be open and honest about the pragmatic assessments that have led to the conclusion that radical reform is justified.

I have fundamental disagreements with most aspects of the majority opinion in *Hudson v. Michigan*. At the time it was handed down, I thought it had little, if any, redeeming value. After *Herring* and *Davis*, I have changed my mind. Justice Scalia's confrontational and much more transparent approach, his willingness to express the anti-*Mapp* premises that animated the decision, seems far preferable to the silence and stealth of the later opinions. The failure to acknowledge, explain, and defend the premises, assumptions, and understanding of realities that have

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[160] *See Davis*, 131 S. Ct. at 2427; *Herring*, 555 U.S. at 140.

[161] It is certainly arguable that the Court erred when it abandoned the premise that exclusion is a constitutional right. *See Leon*, 468 U.S. at 935–44 (Brennan, J., dissenting).

been instrumental in the Court's adoption of the culpability limitation, and the refusal to respond persuasively to competing assumptions and understandings, impede productive debate and raise serious doubts about the legitimacy of the ongoing revolution.

V. CONCLUSION

For now, formal abolition of the Fourth Amendment exclusionary rule seems unlikely. At least five Justices seem to believe that it should survive—if only in theory. Moreover, those who would overthrow the suppression doctrine surely understand that with the culpability threshold in place society will seldom have to swallow the "bitter pill." The rule will impose few costs, rarely impede the truth, and bestow only occasional windfalls on guilty criminals.

Davis v. United States confirms that the Court is committed to revolutionary curtailment of the suppression remedy and that the culpability threshold is the preferred vehicle for affecting that revolution. The revolutionaries believe that evidentiary exclusion is rarely necessary or justifiable. They have implemented that belief by installing a very fine doctrinal filter for suppression claims, a screen that allows only sufficiently blameworthy constitutional violations to pass. This radical reform of the exclusionary rule rests on implicit confidence in law enforcement, a sense that a generous suppression doctrine is unnecessary, and a belief that privacy and liberty can be preserved without freeing guilty, dangerous criminals. Those who care about the Fourth Amendment—a nation-defining Bill of Rights provision that grants a "right" not to criminals, but to all of "the people"—can only hope that this confidence is well-placed, that this sense is accurate, and that this belief is prescient.